Re Koh Kim Kuay, ex p MBf Finance Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY PETITION NO D3–29–1698–91
VC GEORGE J
21 NOVEMBER 1994

Bankruptcy *— Petition — Validity of creditor's petition — Affidavit of truth of contents affirmed prior to presentation of petition — Whether petition attached to affidavit verifying truth of contents must be a sealed copy — Bankruptcy Act 1967 s 6(1) — Bankruptcy Rules 1969 r 106(1)*

In this case, the judgment debtor in bankruptcy proceedings made an application to the court to strike out the creditor's petition on the ground that the petition was invalid because: (i) the affidavit verifying the petition had been affirmed prior to the presentation of the petition when it should have been affirmed only after the petition had been presented; and (ii) the copy of petition attached to the affidavit verifying the petition was not a sealed copy.

Held, dismissing the application:

(1) Although s 6(1) of the Bankruptcy Act 1967 and r 106(1) of the Bankruptcy Rules 1969 ('the rules') provide that a creditor's petition shall be verified by affidavit, they do not prescribe the time as to when the affidavit verifying the creditor's petition is to be affirmed.

(2) However, on the strength of the authorities, it has been generally accepted that the effect of the rules is that every creditor's petition presented without an affidavit verifying the petition annexed to it would not be received by the court's registrar. Accordingly, it is clear that the affidavit verifying the petition has accordingly to be affirmed prior to the presentation of the creditor's petition, and not after that.

(3) Since the creditor's petition has to be verified by affidavit before it is filed, it also follows that the copy of the creditor's petition annexed to the verifying affidavit could not be a sealed copy.

[Bahasa Malaysia summary

Dalam kes ini, penghutang penghakiman di dalam prosiding kebankrapan telah membuat suatu permohonan kepada mahkamah untuk membatalkan petisyen pemiutang atas alasan petisyen itu tidak sah kerana: (i) afidavit yang menentusahkan petisyen pemiutang telah diikrarkan sebelum pengemukaan petisyen tersebut sedangkan ia seharusnya diikrarkan hanya selepas petisyen itu dikemukakan; dan (ii) salinan petisyen yang dilampirkan kepada afidavit yang menentusahkan petisyen tersebut merupakan satu salinan yang belum dimeterai.

Diputuskan, menolak permohonan itu:

(1) Sungguhpun s 6(1) Akta Kebankrapan 1967 dan k 106(1) Kaedah-Kaedah Kebankrapan 1969 ('kaedah tersebut') menyatakan bahawa petisyen pemiutang mesti ditentusahkan oleh afidavit, tetapi kaedah tersebut tidak menyatakan masa bila afidavit yang menentusahkan petisyen pemiutang harus diikrarkan.

(2) Walau bagaimanapun, mengikut autoriti-autoriti, telahpun diterima secara umum bahawa kesan kaedah tersebut ialah bahawa suatu petisyen pemiutang yang dikemukakan tanpa dilampirkan dengan afidavit yang menentusahkan petisyen tersebut, tidak akan diterima oleh pendaftar mahkamah. Oleh itu, adalah jelas bahawa afidavit itu haruslah diikrarkan sebelum pengemukaan petisyen pemiutang dan bukannya selepas itu.

(3) Oleh kerana petisyen pemiutang harus ditentusahkan melalui afidavit sebelum ia difailkan, ini juga bermakna salinan petisyen pemiutang yang dilampirkan bersama affidavit yang menentusahkan petisyen itu tidak boleh merupakan suatu salinan yang telah dimeterai.]

Notes

For cases on creditor's petition, see 1 *Mallal's Digest* (4th Ed) paras 1117–1127; [1989] Mallal's Digest 77; [1990] Mallal's Digest 57–62; [1991] Mallal's Digest 138–148; [1992] Mallal's Digest 111–126; [1993] Mallal's Digest 84–90.

Cases referred to

Anon (1861) 5 LT 527 (refd)

Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 (distd)

Daunt, Re (1905) 5 SR (NSW) 533 (folld)

Debtor, Re A [1933] 1 WN 87 (folld)

Lindsay, ex p [1874] LR 19 Eq 52; 31 LT 415 (refd)

Foo Kee Yan, Re (Penang High Court Suit No 29–329–90) (unreported) (refd)

Hong Weng Keong, ex p Marketlink (M) Sdn Bhd, Re [1993] 1 MLJ 60 (refd)

Lee Boon Hoi, Re [1992] 1 AMR 45 (folld)

Loo Cheng Liang v Ban Hin Lee Bank Bhd [1992] 2 MLJ 519 (refd)

Mohd Sharif bin Sapie, ex p Malayan Banking Bhd, Re [1992] 2 MLJ 102 (folld)

Ooi Thean Chuan v Banque Nationale de Paris [1992] 2 MLJ 526 (distd)

Sharif Hj Sabari, Re [1992] 3 CLJ 1775 (not folld)

Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32 (not folld)

Teoh Thean Peng, ex p D & C Leasing Sdn Bhd, Re [1993] 2 MLJ 1 (folld)

Western Benefit Building Society (1864) 33 Beav 368; 55 ER 409 (refd) A

Legislation referred to

Bankruptcy Act 1967 s 6(1)
Bankruptcy Rules 1969 r 106(1) B
Companies (Winding-Up) Rules 1972 r 26

Hoe Gieok Hiok (*Wong, Quek & Hoe*) for the judgment debtor.
Ranjit Singh (*Tay Hong Huat* with him) (*Gheang & Ariff*) for the judgment creditor. C

Cur Adv Vult

VC George J: This is an application by the respondent [judgment debtor] in a bankruptcy petition to have the petition struck out *in limine* relying on *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32, which judgment purported to follow *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173, on the ground that the affidavit verifying the petition should have been affirmed after the petition had been presented and not prior to that as was the case here, and as was the case in *Sobri bin Arshad;* and on the further ground that the copy of the petition attached to the verifying affidavit was not a sealed copy (purporting to rely on *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526). D E

In *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102, I had pointed out at p 104 that:

> It is s 6(1) of the [Bankruptcy] Act [1967] that provides that a creditor's petition shall be verified by affidavit. This provision is repeated in r 106(1) of the Bankruptcy Rules 1969 ('the rules'). The equipollent r 26 in the Companies (Winding-Up) Rules 1972 provides that the affidavit verifying the petition for the winding up of a company 'shall be sworn after and filed within four days after the petition is presented'. However, neither the said s 6(1) of the Act nor the said r 106(1) of the rules (nor any other provision in the said Act and in the said rules thereunder) prescribes when the affidavit verifying the bankruptcy petition is to be sworn and filed. F G

However, although the bankruptcy rules do not prescribe when the affidavit has to be sworn and filed, there are judgments of superior courts of jurisdictions having bankruptcy rules, in the context similar to our rules, that hold that the effect of the requirements of the rules is that a bankruptcy petition without a verifying affidavit shall not be received. H

As early as 1874, in *Ex p Lindsay* (1874) LR 19 Eq 52; 31 LT 415, Sir James Bacon CJ said at p 54:

> The reason for requiring that affidavit to be made is, that it would not be right that the petition should be received by the registrar without it; its only purpose is to justify the receiving of the petition and the sealing of a copy for serving, and it has nothing to do with the provision of s 8 of the Act, that the court at the hearing is to require proof of the act of bankruptcy alleged in the petition. I

A It would seem that by at least 1933, it had come to be generally accepted in England as trite, that the affidavit verifying a bankruptcy petition had to be affirmed prior to the presentation of it to the registry of the court, because in presenting the petition, it had to be supported by the affidavit. In *Re A Debtor* [1933] 1 WN 87, in setting out the background to the case, B it was noted that:

> On 8 November, the petitioning creditor, as required by r 151 of the Bankruptcy Rules 1915, swore the usual affidavit verifying the statements in the petition exhibited, which was signed by the petitioner on the same day, namely, 8 November, at which date the act of bankruptcy alleged in the petition to have been committed had not in fact been committed. On C 10 November, the petition and the affidavit were, as required by r 154, brought before the registrar for investigation, and he treated the statements in the petition as true statements, and sealed the petition, which together with the affidavit, which had been sworn on 8 November, were accordingly filed, and copies of the petition were sealed for service.

D In the course of his submissions, counsel there stated without challenge that: 'The sole object of the affidavit verifying the petition was to justify the receiving and sealing the petition and copies for service'.

In *Western Benefit Building Society* (1864) 33 Beav 368; 55 ER 409, it was pointed out that in England, even in respect of a petition to wind up E a company, prior to the inclusion in the rules of the provision that the affidavit verifying the petition shall be sworn after and filed within four days after the petition is presented, the practice was 'to annex the affidavit to the petition, and which therefore required it to be sworn before the filing of the petition'.

F Even in *Sobri bin Arshad* [1991] 3 MLJ 32, the learned judge, Edgar Joseph Jr J, (as he then was), refers with approval at p 33 of the report to such a holding in an old English case:

> It would appear that the validity of the creditor's petition depends on there being filed in court an affidavit verifying the truth of the allegations therein. G So, for example, the case of *Anon* (1861) 5 LT 527 is authority for the proposition that every petition for adjudication of bankruptcy must be accompanied with an affidavit verifying the allegations therein or it would not be received.

The judgment went on at p 33 to find further support for that holding in H *Atkin's Court Forms*:

> Furthermore, step No 7 of the Procedural Tables No 6 at pp 119–120 of 7 *Court Forms* (2nd Ed, 1988 Issue) on bankruptcy and insolvency reinforces that view.

I However, reliance was placed by counsel moving this application on *Sobri bin Arshad* because the learned judge there had gone on to hold that because the verifying affidavit was sworn before the presentation of the petition, the proceedings were flawed and that there was no valid petition before the court.

Counsel for the applicant, in urging me not to follow my own judgment in *Re Mohd Sharif bin Sapie* [1992] 2 MLJ 519, went on to point out that in *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526, Edgar Joseph Jr J had gone on to analyse *Re Mohd Sharif bin Sapie* and had found flaws in it as well.

I have to pause to note that such an analysis and the finding made thereafter has to be regarded as obiter, in that the only issue in *Re Mohd Sharif bin Sapie* was not an issue in *Ooi Thean Chuan*. However, the learned judge thought it relevant to say at p 536 of *Ooi Thean Chuan*:

> I must next mention my decision in *Sobri bin Arshad v Associated Tractors Sdn Bhd*, where I had held that a creditor's petition was not valid because the affidavit verifying its contents had been affirmed before it was presented. In arriving at that conclusion, however, I did not treat the issues which arose for consideration with the same degree of elaboration as in the present case, a course which I have found necessary in view of a recent decision of VC George J in the case of *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* wherein his Lordship embraced the opportunity of saying that he did not share my view in *Sobri*'s case.

He then went on to point out what he considered to be omissions of 'critical substance' in the approach taken by me in the *Re Mohd Sharif bin Sapie* judgment. He said [at p 537]:

> In my view, the learned judge ought to have considered the following questions of critical substance:
>
> (1) whether s 6(1) of the Bankruptcy Act, read with Form 11 prescribed by r 106(1), requires the petition not only to accompany the verifying affidavit but also to be annexed to it upon presentation;
>
> (2) if so, whether due verification of the creditor's petition is a condition precedent to the issue of the creditor's petition having regard to the penal consequences of adjudication; and
>
> (3) if so, whether non-compliance with such condition precedent sweeps away the jurisdiction of the court to bring the alleged bankrupt before the court and so cannot be condoned.

He went on to critically note:

> ... that the learned judge has concentrated on the question whether affirming the affidavit before the creditor's petition is filed would affect the validity of the petition.

And he concluded:

> In my view, he ought to have held that upon a proper construction of s 6(1) ... it is a condition precedent that a bankruptcy petition would not only have to be accompanied by a verifying affidavit but also be annexed to it ... In consequence of not so holding he appears to have placed undue stress on r 26 which has nothing to do with bankruptcy proceedings ...

As has been seen, the validity of a bankruptcy petition where the verifying affidavit is sworn prior to the filing of the petition has been considered in a number of cases in England. Further, after *Sobri bin Arshad* and *Re Mohd*

A *Sharif bin Sapie*, there have been a number of local judgments in which the ratio similar to that, in one of the other of those two judgments have been or in effect have been followed, eg Zakaria Yatim J (as he then was) in *Re Sharif Hj Sabari* [1992] 3 CLJ 1755 followed *Sobri bin Arshad* [1991] 3 MLJ 32; Lamin J (as he then was) in *Re Hong Weng Keong, ex p Marketlink (M) Sdn Bhd* [1993] 1 MLJ 60 specifically declined to
B follow *Sobri bin Arshad*; in *Re Teoh Thean Peng, ex p D & C Leasing Sdn Bhd* [1993] 2 MLJ 1 at pp 7–8, KC Vohrah J considered both *Sobri bin Arshad* and *Re Mohd Sharif bin Sapie* [1992] 2 MLJ 102 as well as almost all the reported local judgments on the point after those two judgments, and chose to, in effect, follow *Re Mohd Sharif bin Sapie*, which was what in
C effect Mahadev Shankar J (as he then was) also did in *Re Lee Boon Hoi* [1992] 1 AMR 45 at p 214. Mohamed Dzaiddin J (as he then was) in an unreported decision in *Re Foo Kee Yan* (Penang High Court Suit No 29–329–90) considered both *Sobri bin Arshad* and *Re Mohd Sharif bin Sapie* and chose to concur with the ratio in the latter judgment. Particularly because of the existence of the two conflicting views of our courts of co-
D ordinate jurisdiction, and in the face of the said specific critical analysis of my judgment in *Re Mohd Sharif bin Sapie* made in *Ooi Thean Chuan* [1992] 2 MLJ 102 on which counsel relied, I have no choice but to give due consideration to what his Lordship had in *Ooi Thean Chuan* suggested I ought to have considered, and following on that, what his Lordship
E thought I should have held in *Re Mohd Sharif bin Sapie*.

However, in doing so, I found great difficulty in comprehending the first of those said three questions posed by his Lordship (or at least why it was posed) in the context of the facts and the issues in *Re Mohd Sharif bin Sapie*, in that the question of whether the petition was annexed to the
F verifying affidavit had not been raised, and in any event it was not an issue in that case. Clearly, there is no call for a judge to give consideration to a question not raised or posed in the matter before him. It was in fact common ground that the petition in *Re Mohd Sharif bin Sapie* was annexed to the verifying affidavit as can be seen from the introductory paragraph of the judgment that sets out the undisputed facts (commencing at p 103 of
G the report):

> In these bankruptcy proceedings the petition was dated 5 March 1991 on which date it was signed on behalf of the petitioner by its branch manager Phong Ken Pin in the presence of an advocate and solicitor who duly attested the petition by signing it as witness. On the same day, 5 March
H 1991, the said Phong Ken Pin affirmed an affidavit verifying the petition. *The original copy of the petition was annexed to the verifying affidavit.* The petition and the said affidavit were filed in court on 13 March 1991 on which date the required deposit of RM300 had been effected with the official assignee whose receipt for the same was, as is required, produced to the registry of the court. (Emphasis added.)

I Clearly, in analysing *Re Mohd Sharif bin Sapie*, the learned judge was under the misconception that the petition was not annexed to the verifying affidavit, and clearly, the first of the three questions posed to me was based on that misconception. The other two questions which his Lordship thought

I should have considered was said to be and is consequential to the first question, and accordingly they do not call for any further comment. The learned judge's view as to what I should have held has to be respectfully regarded as an erroneous view stemming from the said misconception.

As to the paragraph from the extract from his Lordship's judgment suggesting that my concentration in the case was misapplied, all I need say is that it is not surprising that I concentrated on the question of 'whether affirming the affidavit before the creditor's petition is filed would affect the validity of the petition' because that was the only issue for adjudication in the case!

It is interesting but somewhat confusing to note that his Lordship in dealing with my judgment in *Re Mohd Sharif bin Sapie* [1992] 2 MLJ 102 goes on to appear to agree with my opinion saying:

> Doubtless, as the learned judge puts it, 'out of pragmatic necessity' the dating, signing, witnessing and attesting of a petition would have to take place before the petition is filed. Once these steps have been complied with the petition comes into being even though not yet filed. The contents of the petition would then have to be verified by affidavit in accordance with Form 11 prescribed by r 106.

He, however, then veered back to repeat that there was the need to have the petition annexed to the affidavit (an aspect of the matter, as has been seen, not in issue in the judgment that he was analysing), and critically noted that I had placed undue stress on r 26 of the winding-up rules. What was overlooked by his Lordship was, in *Re Mohd Sharif bin Sapie* also, what was urged on me by counsel was, that I should follow *Sobri bin Arshad* [1991] 3 MLJ 32, which although was in respect of a bankruptcy petition, unfortunately followed the ratio in *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 as can be seen at p 33 of *Sobri bin Arshad* where the striking out of a winding-up petition (for not meeting the requirements of r 26) was cited with approval and applied:

> It is trite law that an affidavit must be made in some cause or matter pending in court. An affidavit cannot support an 'unborn petition' as a petition comes to life only when presented.
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> In *Western Benefit Building Society* (1864) 33 Beav 368; 55 ER 409, Sir John Romily MR decided that an affidavit sworn before the presentation of the petition 'amounts to nothing'. That case was followed in the local case of *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 where Syed Othman J (as he then was) struck out a winding-up petition because the affidavit was sworn before the presentation of the petition.
>
> I therefore agree with the submissions of the counsel for the judgment debtor that the flaw in the proceedings hereinbefore mentioned vitiates the creditor's petition and cannot be cured by the discretionary powers of the court conferred by s 133 of the Bankruptcy Act. Nor, for that matter, is it open to me to extend the time for filing as there is no valid petition before the court. As was well put in the case of *Chin Yoon Timber Co* [at p 174]:
>
> > '... The question of extension or abridgment to which this rules relates, does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the Master of the Rolls said in *Re Western*

> *Benefit Building Society* (1864) 33 Beav 368; 55 ER 409 you cannot verify to an unborn petition; a petition comes to life only when presented ...'. (Emphasis added.)

Now, the only issue for adjudication in *Sobri bin Arshad* [1991] 3 MLJ 32 was whether the bankruptcy petition which was dated 10 November 1989, was valid in the face of the fact that the verifying affidavit was affirmed on 9 November 1989, ie prior to the presentation of the petition. The references made in the judgment to the inability to verify to an unborn petition, that a petition only comes to life after it is presented, and the express reliance placed on *Chin Yoon Timber Co v Overseas Lumber Bhd* cannot but be a reading by his Lordship into the bankruptcy rules of a non-existent rule equipollent to r 26 of the winding-up rules. It follows that in declining to follow *Sobri bin Arshad*, I had to be at some pains to point out that to be the position. The criticism of my doing so is, I think, with respect, unmerited. What accordingly had to be done and was deliberately done, was to stress the point that there is no rule in the bankruptcy rules equipollent to r 26 of the winding-up rules and the reliance on r 26 in *Sobri bin Arshad* was erroneous, and that accordingly, I would decline to follow that judgment.

Apart from the learned judge's said concession that he agreed with me that pragmatic necessity dictated that verification had to take place before the petition is filed, there is other material that suggests that the learned judge had changed his views on the subject some time after *Sobri bin Arshad.*

In the year following *Sobri bin Arshad*, it was Edgar Joseph Jr J himself, in giving the judgment of the High Court in Penang in *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526 and in dealing with a question that arose in that case on the effect of the failure to annex the petition to the verifying affidavit, who referred to the Australian case, *Re Daunt* (1905) 5 SR (NSW) 533, to point out with approval at p 535 that:

> ... Walker J held that a petition was presented when it was filed and was not validly presented unless and until it has been filed together with a verifying affidavit.

Ooi Thean Chuan was delivered on 27 February 1992. On that same day, his Lordship read his judgment in *Loo Cheng Liang v Ban Hin Lee Bank Bhd* [1992] 2 MLJ 519, where it is gratifying to note that he decided not to follow *Sobri bin Arshad* (although no reference was made to that judgment), and in effect chose to follow the ratio adopted in *Re Mohd Shafie bin Sapie* [1992] 2 MLJ 102. His Lordship held at p 523 of the report:

> Accordingly, I am amply satisfied that an affidavit verifying a creditor's petition in the manner prescribed by the peremptory s 6(1) of our Act read together with Form 11 prescribed by r 106, is a condition precedent to the issue of a creditor's petition. In the present case, upon the facts, there had been a clear breach of those provisions for, at the date of the issue of the creditor's petition, it was unverified by affidavit.

Accordingly, both on principle and on authority, it is my judgment that it is clear that the registrar must be satisfied that the petition had been verified before it would be received by him/her. I think it can be safely said that it is beyond any argument that it has accordingly to be affirmed prior to the presentation.

I hasten to add that in the light of the ratio of *Anon* (1861) 5 LT 527, *Ex p Lindsay* (1874) LR 19 Eq 52; 31 LT 415, and *Re Daunt* (1905) 5 SR (NSW) 533 referred to herebefore, what I had said in *Re Mohd Sharif bin Sapie* at p 106, that:

> [I failed to see] that anything turns on whether the affidavit is affirmed before or after the petition is presented so long as it is clear that it is the contents of the petition that are being verified ...

was said obiter because in fact the affidavit had been affirmed immediately before the petition was presented and it was annexed to the affidavit, and has to be, to that extent, accepted as being an incorrect expositon of the law.

As to the second ground, that is that the copy of the petition annexed to the verifying affidavit has to be a sealed copy, clearly, since the petition has to be verified before it is filed, it follows that the copy of the petition annexed to the verifying affidavit cannot be a sealed copy. *Ooi Thean Chuan* on which counsel for the applicant purported to rely does not say otherwise.

The application had to be and was dismissed with costs.

Application dismissed.

Reported by Isabel Liong